BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD JOHNSON	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,059,934
	)	
USD #501	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the May 18, 2012, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.[1] George H. Pearson, III, of Topeka, Kansas, appeared for claimant. John A. Bausch, of Topeka, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment, that notice was timely, that written claim was timely, and that claimant was a credible witness. The ALJ did not order respondent to pay claimant temporary total disability compensation or to pay for claimant's medical treatment. The order neither awarded nor denied any benefits whatsoever.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 17, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's findings that claimant suffered an accidental injury that arose out of and in the course of his employment, that claimant's notice was timely, that written claim was timely, and that claimant was a credible witness. Respondent asks that the ALJ's Order be reversed.

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[1] The Order Referring Claimant for Independent Medical Evaluation, filed May 18, 2012, was not appealed to the Board.

Claimant asks the Board to affirm the ALJ's Order.

The issues for the Board's review are:

(1) Did claimant suffer an accidental injury that arose out of and in the course of his employment?

(2) Did claimant give respondent timely notice of his accident?

(3) Was claimant's written claim timely?

FINDINGS OF FACT

Claimant testified he had worked for respondent for 27 years and is currently the custodial supervisor at Topeka West High School. On January 18, 2011, claimant had arrived at work about 4:15 a.m. to remove snow from the walks and steps before school started at 8 a.m. Claimant had been shoveling about five hours when his left shoulder and the left side of his neck started bothering him. Claimant testified that when the administrators arrived at the building, he reported his injury to Sherri Waters, the associate principal, and Steve Roberts, the interim principal. Both told him to go see Mary Lynn McGee, respondent's nurse.

Claimant then went to the administration building at about 10 a.m. and reported his injury to Ms. McGee. She did not refer him to a doctor. Instead, she told claimant to go home and use home therapies, such as long, hot showers, heating pads and ice packs. Claimant denied telling Ms. McGee that he did not want to fill out an accident report. He did not tell Ms. McGee that he did not want to fool with it. Claimant acknowledged he did not tell Ms. McGee that he wanted to see a physician. Claimant said he went home and tried the home remedies as suggested by Ms. McGee.

On April 28, 2011, claimant went back to Ms. McGee for a follow up. Claimant said Ms. McGee told him to fill out an accident report. Claimant testified he asked Ms. McGee what date to put on the report, and she told him to date the report April 28. Claimant said Ms. McGee told him he could not back-date the report and that since the 10 days had expired since the accident, he should put an April 28, 2011, date of accident. Claimant admitted he was not injured on April 28, but he did not question putting that date down as his date of accident as he was following Ms. McGee's instructions. April 28, 2011, was the first date that claimant spoke with Ms. McGee about pursuing a workers compensation claim.

Claimant acknowledged he had been a supervisor for all custodians at respondent for nine years. He has signed off on accident reports as a supervisor. He said there have been misunderstandings over the years about the process for filling out a claim for workers compensation and that he had always been told to see the district nurse if he was hurt.

Claimant agreed the accident report indicates he was to report his injury to his building administrator or supervisor immediately, and he did so by reporting his injury to Ms. Waters and Mr. Roberts.

Respondent referred claimant to Dr. Dale Garrett. Claimant first saw Dr. Garrett on May 2, 2011. Dr. Garrett's medical record of that date indicates claimant complained of moderate pain in his left shoulder and neck that had been present since shoveling snow in December 2010. Claimant denied telling Dr. Garrett his pain started around Christmas 2010. He testified he told Dr. Garrett he had injured his left shoulder and neck while shoveling snow on January 18, 2011. Claimant testified he did not know why Dr. Garrett's records show he said he was injured in December 2010.

Mary Lynn McGee, a nurse for respondent, testified that on January 18, 2011, claimant came to her office and told her about his complaints in his neck and shoulder. He told Ms. McGee that he had been shoveling snow that day. Ms. McGee suggested conservative treatment. Ms. McGee testified she told claimant if he considered it to be a workers compensation injury, he needed to fill out an accident report. She stated she had the forms in her office, and all the schools have them. Ms. McGee said claimant told her he did not want to fill out a form as he did not "want to fool with that" and also said he was not quite sure if it was all work-related.[2] Ms. McGee filled out a nursing care form indicating claimant came in the morning of January 18, 2011, complaining of pain in the left side of his neck radiating to his shoulder which he attributed to shoveling snow. She also indicated in her report that claimant refused to take an incident report form.

Ms. McGee testified she did not help claimant fill out the accident report on April 28, 2011, nor did she advise him to put down a date of accident of April 28, 2011. She said she did not tell claimant that if he were to put down a date of accident of January 18, 2011, he would be too late to pursue a workers compensation claim.

Mrs. McGee said that injured workers are sent to her and if an injury is something she cannot take care of, often she will refer an injured worker to Work Care at Stormont Vail. She said in many instances she is the person who decides whether a worker will go to Work Care. When claimant returned to her clinic in April 2011, she referred him to Dr. Garrett.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as

[2] P.H. Trans. at 8, 14.

follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as

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[3] K.S.A. 2010 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

> provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

The only witnesses that have testified in this case are the school district's nurse, Ms. McGee, and the claimant, Mr. Johnson. Both testified in person at the preliminary hearing before Judge Avery. In his order, Judge Avery specifically noted that he found claimant to be a credible witness. The Board generally gives more deference to an ALJ's findings concerning the credibility of witnesses where the ALJ had the opportunity to observe the testimony in person. And having read the testimony of the witnesses, this Board Member finds it is appropriate to give such deference in this case. Claimant's testimony is credible.

Claimant was injured at work on January 18, 2011, while performing his job duty of shoveling snow. His accident and injury arose out of and in the course of his employment. Respondent contends that claimant failed to give it timely notice of his accident. K.S.A. 44-520 requires notice of accident to be given to the employer within 10 days after the date of the accident. Claimant reported his accidental injury to his supervisor that same day. Therefore, notice was timely given. Respondent also contends that claimant failed to provide it with a timely written claim. K.S.A. 44-520a(a) requires that claimants provide a

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[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2011 Supp. 44-555c(k).

written claim for compensation to their employer within 200 days of their accident or the last payment of compensation. Claimant's accident occurred on January 18, 2011. The 200 days from the date of accident would end on August 8, 2011.[8] Claimant made a report of accident on April 28, 2011, which was within the 200 days. However, he used April 28, 2011, as the date of accident on the accident report form instead of the actual date of accident of January 18, 2011. Claimant testified that even though he told Ms. McGee that his accident occurred on January 18, 2011, she instructed him to use the April 28, 2011, date on the report form. Ms. McGee denied telling claimant this. Respondent referred claimant to Dr. Garrett for medical treatment. His records reflect an accident date in December 2010.

Claimant argues that the April 28, 2011, accident report satisfies the written claim requirement because Ms. McGee knew claimant was reporting the January 18, 2011, accident he had previously verbally reported to her; the mechanism of injury was reported as shoveling snow, which obviously did not happen on April 28, 2011; and Ms. McGee instructed claimant to use the April 28, 2011, date on the accident report form. Also when claimant reported the neck and left shoulder injury to Ms. McGee on January 18, 2011, she provided him with care. Weighing against claimant is the fact that claimant acknowledged that he is familiar with the procedure for filling out accident reports. He has had prior workers compensation claims, and he is the supervisor of other custodians. As such, he has signed some of their accident report forms. No other writing has been presented to establish written claim was made within 200 days of January 18, 2011. Claimant's Application for Hearing was filed on March 8, 2012, which is long after the 200 days from the date of accident expired. However, the record is not clear whether this was less than 200 days after the last payment of medical compensation, *i.e.*, authorized medical treatment. Claimant testified that the last day he treated with Dr. Garrett was October 4, 2011. This date is within 200 days of March 8, 2012. So if the last office visit with Dr. Garrett was authorized treatment, then claimant's March 8, 2012, Application for Hearing would constitute timely written claim. As it was respondent that sent claimant to Dr. Garrett initially, it is likely that all of Dr. Garrett's bills were authorized and paid by respondent.

This Board Member finds that the accident report of April 28, 2011, satisfies the requirement for a written claim. Claimant says Ms. McGee instructed him to use April 28, 2011, as the date of accident on that accident report form. Although Ms. McGee denies having any hand in the completion of the Employee Accident form, it is apparent that more than one person's handwriting appears on that report form. Furthermore, it seems obvious that claimant was reporting the same injury he saw Ms. McGee for in January because it is for the same body parts he complained of then and he described the same cause, shoveling snow. There is no claim that it snowed in Topeka on April 28, 2011. Furthermore, it is clear Ms. McGee understood claimant was in her office on April 28, 2011,

[8] In this case, 200 days from January 28, 2011, fell on a Saturday, August 6, 2011. The next business day was Monday, August 8, 2011.

for the same injuries as on January 18, 2011, because she said she referred him to Dr. Garrett due to the fact that the conservative measures she had give on January 18, 2011, had not relieved claimant's symptoms.

This Board Member agrees with Judge Avery and finds the accident report form dated April 28, 2011, substantially complies with the intent and purpose of the requirements in K.S.A. 44-520a. Also, Ms. McGee and respondent never disabused claimant of his right to continue to obtain treatment until sometime shortly before claimant's demand letter was served in March 2012.

CONCLUSION

(1) Claimant suffered personal injury by accident arising out of and in the course of his employment with respondent.

(2) Claimant gave respondent timely notice of his accident.

(3) Written claim was timely given.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 18, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: George H. Pearson, III, Attorney for Claimant
georgepearsonlaw@sbcglobal.net
dfloyd.georgepearsonlaw@yahoo.com

John A. Bausch, Attorney for the Self-Insured Respondent
jbausch@goodellstrattonlaw.com

Brad E. Avery, Administrative Law Judge